

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' RESPONSE TO
"DEFENDANT B&H'S MOTION FOR A BILL OF PARTICULARS" (DOCKET # 42)
AND "LANDON MARTIN'S MOTION FOR LEAVE TO JOIN IN DEFENDANT B&H'S
MOTION FOR A BILL OF PARTICULARS AND SUPPLEMENTAL
STATEMENT IN SUPPORT THEREOF" (DOCKET # 48)**

The United States hereby responds to Defendant B&H Maintenance & Construction, Inc.'s ("B&H") and Defendant Landon R. Martin's ("Martin") Motions for a Bill of Particulars (Docket # 42 and # 48). The Indictment in this case and the extensive discovery afforded to the Defendants are sufficient to: fully apprise them of the nature of the charge against them; allow them to prepare their defenses; minimize surprise at trial; and plead double jeopardy if later prosecuted for the same offense. In addition, within this Response the United States voluntarily provides the Defendants with many of the further details regarding the Indictment that they seek

by means of their Motions. Accordingly, there is no need for a formal Bill of Particulars in this case and the Defendants' Motions should be denied.

I. The Purpose and Requirements of a Bill of Particulars

Federal Rule of Criminal Procedure 7(f) provides, in part, that "[t]he court may direct the government to file a bill of particulars."¹ "The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *United States v. Dunn*, 841 F.2d 1026, 1029 (10th Cir. 1988) (quoting *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985)).

The decision whether to grant or deny a Bill of Particulars is committed to the sound discretion of the trial court. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983). "The court's decision will not be disturbed if the indictment is sufficient to enable the defendant to prepare a defense, to avoid prejudicial surprise at trial, and to bar the risk of double jeopardy." *Id.*

A Bill of Particulars is not intended to be a discovery device. *Dunn*, 841 F.2d at 1029. Nor is it proper to use a Bill of Particulars as a means of obtaining the evidentiary details of the United States' case or to "explain the legal theories upon which it intends to rely at trial." *Gabriel*, 715 F.2d at 1449, quoting *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980). The Tenth Circuit has consistently held that full discovery

¹ According to the Rule, this motion should be made before or within 10 days of arraignment, unless the court permits otherwise. Thus, Defendants' Motions are untimely filed.

obviates the need for a Bill of Particulars. *United States v. Jenkins*, 313 F.3d 549, 558 (10th Cir. 2002); *United States v. Kunzman*, 54 F.3d 1522, 1526 (10th Cir. 1995); *Gabriel*, 715 F.2d at 1449. Here, the United States has provided Defendants early and generous discovery, going beyond the requirements of Federal Rule of Criminal Procedure 16 and other discovery obligations.²

Taken together, the Indictment, the extensive discovery already made available to the Defendants, and the information provided herein in the United States' Voluntary Bill of Particulars are more than sufficient to apprise the Defendants of the charges against them and to enable them to adequately prepare for trial. Thus, the Defendants' Motions for a Bill of Particulars should be denied.

II. Defendants' Request for Particulars³

A. Requests for Particulars as to Dates and the Identity of the Officers Though Whom B&H Became a Party to the Conspiracy

B&H's Motion at Paragraph 7, (a) through (d), requests information concerning the dates on which the conspiracy began and ended, and the dates on which the various coconspirators joined or left the conspiracy. (Def. B&H's Mot. for Bill of Parts. ¶7(a)-(d) (Docket # 42))

² For detail concerning the scope and timing of the discovery which the United States has provided in this case, *See* United States' Opposition to "Motion by Defendant Smith for Discovery" (Docket #51) and "Defendant B&H's Motion for Discovery (Docket #43), Sec. I, filed this same day.

³ In its Motion, Defendant B&H has set forth the particulars it requests in paragraph 7. (Def. B&H Mot. for Bill of Parts. ¶ 7 (Docket # 42)) Defendant Martin has moved to join in Defendant B&H's Motion for a Bill of Particulars and has also filed a supplemental statement in support thereof. (Martin's Mot. for Leave to Join (Docket # 48))

Additionally, Paragraph 7(i) of B&H's Motion requests information about the agents through whom B&H became part of the conspiracy. (Def. B&H's Mot. ¶7(i)) The Indictment itself provides B&H sufficient information as to the beginning and end dates of the conspiracy (Indictment ¶1 (Docket # 1)) ("Beginning in or about June 2005, and continuing until as late as December 2005") and the identity of the agents through whom Defendant B&H participated in the conspiracy. (See Indictment at ¶¶ 4, 5, 6, and 8.) Furthermore, the extensive discovery already provided to the Defendants contains additional details about when various acts were undertaken in furtherance of the conspiracy. In the United States' Voluntary Bill of Particulars set forth below, (Part III, A. and B.) the United States provides the Defendants with additional information relating to B&H's requests in ¶ 7(a) - (d) and (i).

B. Requests for the Names of the Pipeline Construction Projects that were the Subject of the Bid Rigging Conspiracy

Paragraph 7(f) of Defendant B&H's Motion, (Def. B&H's Mot. ¶7(f)) requests the names of the pipeline construction projects that were rigged by the conspirators. That information is provided herein at Part III, C.

C. Requests for Evidentiary Detail

Paragraphs 7(e) ("each act performed. . .") and (h) (whether the agreement was express or implied, oral or written) of Defendant B&H's Motion (Def. B&H's Mot. ¶7(e) and (h)) request evidentiary detail, not properly the subject of a Bill of Particulars. Providing this detail would unduly "restrict the Government in the presentation of its case, and [is] wholly unnecessary for any legitimate purpose . . .") *United States v. Maine Lobstermen's Ass'n*, 160 F. Supp. 115, 122

(D. Me. 1957). *See also Cefalu v. United States*, 234 F.2d 522, 524 (10th Cir. 1956) ("But the function of a bill of particulars is to define more specifically the offense charged. It is not to disclose in detail the evidence upon which the Government will rely at trial." (citation omitted)). Furthermore, the United States has provided the Defendants with extensive discovery, including documents, FBI 302s and paralegals notes of interviews which contain the information B&H requests.

Paragraph 7(g) of Defendant B&H's Motion, (Def. B&H's Mot. ¶7(g)) while not worded as such, essentially asks the United States to specify what documents it will use at trial as exhibits, and also asks the United States to provide the "content of all oral statements." Such evidentiary detail is not properly the subject of a bill of particulars. *Maine Lobstermen's Ass'n*, 160 F. Supp. at 122; *Cefalu*, 234 F.2d at 524. Furthermore, the United States has provided extensive discovery materials to the Defendants, which contain both the documents relating to the rigged bids, and FBI 302s and paralegal interview notes summarizing witness interviews. Additionally, the United States will file a proposed exhibit list no later than two business days prior to the Trial Preparation Conference, as specified in section V.B.2. of the Court's Practice Standards.

III. United States' Voluntary Bill of Particulars

The United States voluntarily discloses the following information in response to requests made by the Defendants in their Motions.

A. Members of the Conspiracy

The various individuals and corporations who participated as coconspirators are:

Jon Paul Smith
Landon R. Martin

B&H Maintenance & Construction, Inc.
B&H Maintenance & Construction, Inc.

Kenneth L. Rains

Flint Energy Services, Inc.

Defendant, coconspirator B&H participated in the conspiracy by and through the acts of Smith, the vice president and general manager of its Bloomfield, NM regional office, and Martin, marketing manager of its Bloomfield, NM regional office. Flint Energy Services, Inc. ("Flint") participated in the conspiracy through the acts of Rains, then regional manager and head of Flint's Farmington, NM regional office. Both Flint and Rains have pled guilty to participating in this conspiracy. (*United States v. Flint Energy Services, Inc. and Kenneth L. Rains*, 06-cr-00264 PSF) There are no additional coconspirators.

B. Time Frame of the Conspiracy

As the Indictment alleges, the conspiracy began in or about June 2005 and continued until as late as December 2005. Coconspirators B&H, Smith, Flint and Rains joined the conspiracy prior to the time that B&H and Flint submitted bids to the victim, BP America Production Company ("BP America") for the Bayfield 20" Main Loop project in July 2005, and at least by July 7, 2005. Martin joined the conspiracy no later than September 23, 2005. The conspiracy was on-going on December 15, 2005, when Rains was confronted by his superiors at Flint about his bid-rigging activities.

C. The Pipeline Construction Projects that were the subject of the Bid Rigging Conspiracy

The pipeline constructions projects that were rigged by the conspirators are:

Bayfield 20" Main Loop
(also identified as Bayfield Main Loop)
Salvador 10" Loop
(also identified as Salvador SW Loop)

Buford Waytt GU No. 2
Lash Ute GU No. 2
Martinez BU/B No. 1
Schofield GU No. 2
Southern Ute 2-21X No. 2

Mayfield South Loop
Sauls Creek Loop

All of the projects were let by the victim, BP America. The Bayfield and Salvador projects were let in July 2005. The Buford Waytt, Lash Ute, Martinez, Schofield and Southern Ute projects were let in September 2005. Prices for the Lash Ute and Southern Ute projects were combined into one single bid by B&H, and submitted as two separate bids by Flint. The Mayfield and Sauls Creek projects were let in October 2005. Documents relating to all of these projects were produced to Defendants on April 25, 2007.

IV. Conclusion

The United States respectfully requests that the Court deny Defendants' Motions for a Bill of Particulars. The Indictment, the discovery provided to the Defendants by the United States pursuant to Federal Rule of Criminal Procedure 16, the materials disclosed pursuant to the United States' obligations set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985), and the details set forth in the United States' Voluntary Bill of Particulars above, are sufficient to "inform [each]

defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *Dunn*, 841 F.2d at 1029. "The purpose of a bill of particulars is to define more specifically the offense charged. It is not for the purpose of disclosing in detail the evidence upon which the government expects to rely." *Fischer v. United States*, 212 F.2d 441, 445 (10th Cir. 1954); *Cefalu*, 234 F.2d at 524. Thus, the Defendants' Motions for a Bill of Particulars should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing United States' Response to "Defendant B&H's Motion for a Bill of Particulars" (Docket # 42) and "Landon Martin's Motion for Leave to Join Defendant B&H's Motion for a Bill of Particulars and Supplemental Statement in Support Thereof" (Docket # 48) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane Lotko-Baker

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